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IN THE

SUPREME COURT OF THE UNITED STATES

No. 349

E. A. KELLEAM, NELL SOUTHARD, JOE E. KELLEAM AND JOE R. SOUTHARD, JR., *Petitioners*,

vs.

MARYLAND CASUALTY COMPANY OF BALTIMORE, MARYLAND, a corporation, MRS. ETHEL RIDDLER, MRS. DOROTHY PAYNE, J. K. PERKINS, MRS. F. BATES, GLEN PERKINS, BESSIE MATHEWS, MRS. ELOUISE KULP, LEGGETTE HALL, LAMAR HALL, MARGUERITE BRADLEY KELLEAM, MARY KATE HALL, KELLEAM HALL, CLIFFORD KELLEAM, KATHLEEN KELLEAM, DR. FANNIN KELLEAM, FRANCIS KELLEAM, MRS. JIMMIE KELLEAM, AND ROBERT KELLEAM, *Respondents*.

RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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RESPONSE TO THE PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

This response is filed in behalf of Mrs. Ethel Riddler, Mrs. Dorothy Payne, J. K. Perkins, Mrs. F. Bates, Glen Perkins, Bessie Mathews, Mrs. Elouise Kulp, Leggette Hall, Lamar Hall, Marguerite Bradley Kelleam, Mary Kate Hall, Kelleam Hall, Clifford Kelleam; Kathleen Kelleam, Dr. Fannin Kelleam, Francis Kelleam, Mrs. Jimmie Kelleam and Robert Kelleam, who were defendants and cross-petitioners in the lower court. For convenience these parties will be referred to as cross-petitioners in this response.

The cross-petitioners adopt the statement of facts contained in the response of the Maryland Casualty Company and the facts as set out by the Circuit Court of Appeals in their opinion filed herein (R. 149-152). As a matter of brevity the questions presented in this brief will deal with the rights of the cross-petitioners to obtain the relief sought and granted by the trial court and affirmed by the Circuit Court of Appeals. This brief will answer the specifications of error set out in the appellant's brief and not the generalizations indulged in by the appellants.

PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED

The opinion of the Circuit Court of Appeals appears at pages 149 to 159 of record in this case and is reported in 112 Federal (2d), page 940. The petitioners rely on Rule 38, Section 5 (b), to have this court grant a writ of certiorari, which reads as follows:

> "5. (b) Where a Circuit Court of Appeals rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter or has decided an important question of local law in a way probably untenable or in conflict with the weight of authority; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Measured by this rule the petition should, therefore, be denied because:

1. The decision rendered by the Circuit Court of Appeals in this case is not in conflict with the decisions of another Circuit Court of Appeals on the same subject.

2. The decision of the Circuit Court of Appeals in

this case is not in any way in conflict with the applicable decisions of the State of Oklahoma.

3. The decision of the Circuit Court of Appeals is in accord with the applicable general law.

4. The decision of the Circuit Court of Appeals does not involve a question of federal law which has not been decided by this court.

5. The decision of the Circuit Court of Appeals does not decide a federal question in conflict with the applicable decisions of this court.

6. The decision of the Circuit Court of Appeals does not depart in any manner from the accepted and usual course of judicial procedure.

7. The case does not involve a question of general, public or national importance.

1.

A. THE UNITED STATES DISTRICT COURT HAD THE AUTHORITY TO VACATE THE DECREE OF THE COUNTY COURT BECAUSE THE SAME WAS OBTAINED BY FRAUD AND VOID ON ITS FACE.

Wheeler v. Bigheart, 172 Okla. 262, 43 P. (2d) 1028;

Caulk v. Lowe, 74 Okla. 191, 178 Pac. 101;

Forgy v. Lamphear, 144 Okla. 245, 289 Pac. 294;

Beatty v. Beatty, 114 Okla. 5, 242 Pac. 766;

Hewitt v. Hewitt, 17 Fed. (2d) 716;

Marshall v. Holmes, 141 U. S. 589 (9 Cir.) 12 S. CT. 35 LED. 870.

The above cases hold a decree of the County Court may be attacked collaterally for fraud. The case of *Hewitt v. Hewitt,* Supra, the Federal Court granted the identical relief sought.

B. THE JUDGMENT OF THE COUNTY COURT DECLARING THE ESTATE OF LEGGETTE D. KELLEAM TO BE ANCESTRAL IS ABSOLUTELY VOID.

A void judgment may be attacked in any judicial proceeding. The record discloses that none of the property constituting the estate of the deceased Leggette D. Kelleam was in fact ancestral. The property left by the mother of Leggette D. Kelleam, being 7 lots in Blanchard, Oklahoma, none of which constituted a part of the estate of the deceased. The inventory (R. 132-141) of the deceased Leggette D. Kelleam shows that none of these lots were listed as assets of his estate and consequently none of the estate of Leggette D. Kelleam was ancestral and the half brothers and sisters and their heirs would share equally with the full brothers and sisters in the proceeds of the estate of Leggette D. Kelleam.

In re Long's Estate, 180 Okla. 28, 67 P. (2d) 41, 110 A. L. R. 1002;

Zweigel v. Lewis, 139 Okla. 171, 281 Pac. 787;

Thompson v. Smith, 102 Okla. 150, 227 Pac. 77, 29 L. R. A. 541;

In re Yahala's Estate, 142 Okla. 79, 285 Pac. 946;

80 *O. S. A.* 222;

18 *C. J.* 819, Sec. 21;

Eason v. Highley, 28 S. W. (2d) 1048;

Kelly v. McGuire, 15 Ark. 555;

Henderson v. Sherman, 47 Mich. 267, 11 N. W. 153;

Adams v. Anderson, 53 N. Y. S. 141.

The decree of distribution and determination of heirship by the County Judge of Creek County being in plain contravention of the statutes of the State of Oklahoma is therefore void.

In re Sims' Estate, 162 Okla. 35, 18 P. (2d) 1077;

In re Green's Estate, 80 Okla. 256, 196 Pac. 128.

It was found by the trial court that the purported distribution of the estate was both fraudulent and void (R. 83). A void distribution and a subsequent exoneration of the surety under a void decree of distribution confers no rights upon anyone and the surety remains unexonerated.

Condit v. Condit, 66 Okla. 215, 168 P. 456;

Jefferson v. Gallager, 56 Okla. 405, 150 P. 1071.

C. THE RELIEF SOUGHT AND GRANTED BY THE CROSS-PETITIONERS WAS IN CONFORMITY WITH THE GENERAL RULE AS LAID DOWN BY FEDERAL COURTS.

Republic National Bank & Trust Company v. Massachusetts Bonding & Insurance Company, (5 Cir.), 68 Fed. (2d) 445;

Central Surety Corporation et al. v. Bagley, (9 Cir.), 44 Fed. (2d) 808.

In these cases the relief sought and granted to the defendants who became cross-petitioners and intervenors corresponds identically with the case at bar.

2.

A. THIS ACTION WAS NOT AN ATTEMPT BY THE FEDERAL COURT TO ASSUME JURISDICTION OVER THE MATTERS OF THE COUNTY COURT NOR WAS IT AN ATTEMPT TO REVIEW UPON APPEAL THE DECISION OF THE COUNTY COURT.

This was an original action brought by the surety seeking exoneration upon its bond (R. 154). And the cross-petitioners herein were made defendants. The cross-petition was filed by the appellees seeking the relief granted by the District Court and affirmed by the Circuit Court of Appeals. No attempt was ever made to usurp the powers given to the County Court by the Constitution of the State of Oklahoma. Under the decisions cited under 1-A above, both the Federal and State Courts

recognize the rule that a decree of the County Court may be vacated for fraud or if void. It was under these decisions that the cross-petitioners herein sought the relief in the Federal Courts.

B. THE FACT THAT THE COUNTY COURT'S JURISDICTION TO VACATE FOR FRAUD HAD BEEN INVOKED BY THE CROSS-PETITIONERS HEREIN WILL NOT DEFEAT THE FEDERAL COURTS RIGHT TO ADJUDICATE THIS MATTER.

As a general rule in the State and Federal Courts, it is not the first court which takes jurisdiction of a matter that decides a case but rather the first court reaching a ruling upon the merits which becomes res adjudicata.

McDougal v. Black Panther Oil & Gas Company, Okla. 1921, (10 Cir.), 273, Fed. 113;

Insurance Company v. Harris, 97 U. S. 331, 336, 24 LED. 959.

In this case the County Court's decision upon the petition for the re-opening of the estate of Leggette D. Kelleam was not upon its merits, rather the County Court denied its own jurisdiction to vacate its own decree for fraud by sustaining a demurrer, and the case is now pending on appeal in the District Court of Creek County, which court has staid proceedings pending the outcome of the Federal Court case (R. 83). Moreover, the County Court of Creek County does not have jurisdiction to set aside conveyances of real estate or to impress a lien as between the parties in this case.

C. FACTS DETERMINED BY THE TRIAL COURT AND UPHELD BY THE CIRCUIT COURT OF APPEALS WILL NOT BE LOOKED INTO UPON APPEAL.

The petitioners have cited and questioned certain facts found by the trial court and upheld by the Circuit Court of Appeals in this case. The general rule in this matter is that the trial court having made a finding of facts (R. 77-85) the same being upheld by the Circuit

Court of Appeals the petitioners cannot now question these findings.

Baker v. Schofield, 37 S. CT. 333, 243 U. S. 114, 61 LED. 626;

Stuart v. Hayden, 169 U. S. 1, 14, 42 LED. 639, 18 S. CT. Rep. 274.

3.

A. THE ACTION WAS LOCAL UNDER 28 USCA. SECTIONS 116 TO 118.

The property sought to be impressed by a lien is situated both in the Northern District of the State of Oklahoma and the Western District of the State of Oklahoma. This is an action to impress a trust on real and personal property with a fixed situs in the Northern and Western Districts of Oklahoma. Section 116 28 USCA provides that a local action involving property of a fixed character lying partly in one district and partly in another, may be brought in the District Court of either district. Section 118 28 USCA provides for service of summons on absent defendants in suits to enforce liens. It has always been a general rule in the State of Oklahoma that a surety has a lien upon the distributed proceedings of the decedent's estate.

Oklahoma Statutes Annotated, Title 12, Section 1108;

Walton et al. v. Williams, 5 Okla. 642, 49 Pac. 1022.

In the case of *Walton v. Williams,* supra, the court in construing the statute on the right of the sureties said:

"In this case the plaintiffs in both petitions prayed that the defendants be ordered and adjudged to indemnify them, and that, failing so to do, plaintiffs have judgment for the amount of their liability as sureties, and the petitions set forth the grounds which would authorize an order of attachment. This statute was meant to change the common law rule, so

"that a surety should not be compelled to stand by and see the principal, for whose obligations he was bond, fraudulently dispose of his property, and leave his just debts to be paid by those whom he had deluded into becoming his sureties. The court erred in sustaining the demurrer to the petition and in refusing to permit the plaintiffs to file an amended petition."

4.

A. THERE WAS DIVERSITY OF CITIZENSHIP BETWEEN THE REAL PARTIES IN INTEREST.

Maryland Casualty Company, the original petitioner in the District Court, was a citizen of the State of Maryland. Cross-petitioners were citizens of other states and one of the cross-petitioners, who was at that time a defendant, was served as a defendant within the Northern District of the State of Oklahoma. The petitioners herein were residents of various other states. No proof was ever made that any of the petitioners were residents of the State of Maryland. Under the peculiar rights of the surety no realignment of parties could be made.

Republic National Bank & Trust Company v. Massachusetts Bonding and Insurance Company, Supra.

The Court in its opinion stated:

"The basis of the surety's case is an equity of exoneration, an assertion that there are funds of its principal properly applicable to the claims against the bond that ought in equity to be so applied before the surety is called on to pay. We examined and upheld this right of the surety on a construction bond under circumstances much like the present in Glades County v. Detroit Fidelity & Surety Company, 57 Federal (2d) 449. The bill is thus based on the surety's own peculiar rights and seeks its protection as surety. If some of the defendants favor the relief prayed, it occasions no realignment of the parties to the destruction of the surety's right to federal jurisdiction. By the main bill it acquired jurisdiction over the retained

payment and the surety's liability on the bond as a fund for distribution, and could deal fully with those subjects.

"Attack was also made on the jurisdiction to entertain the so-called cross bills against the city and the bank filed by claimants who were citizens of Texas, wherein they sought money judgments against the city and the bank for the amount of their claims. These judgments a federal court could not grant. By the main bill it acquired jurisdiction over the retained payment and the surety's liability on the bond as a fund for distribution, and could deal fully with those subjects. A dependent jurisdiction arose to settle disputes even between citizens of the same state and involving amounts less than $3,000.00 so far as necessary fully to administer that fund. But dependent jurisdiction exists only because and so far as it is necessary to fully exercise the main jurisdiction."

CONCLUSION

In conclusion, it is respectfully submitted that the petition for writ of certiorari in the instant case is merely the attempt of the defeated party in the Circuit Court of Appeals to obtain another hearing in its case. The writ of certiorari is never granted for such purpose.

Magnum Import Co. v. Coty, 262 U. S. 159.

The granting of the writ is sparingly exercised by this court.

Re Lau Ow Bew, 141 U. S. 583;

In re Woods, 143 U. S. 202.

It is not contended that the cross-petitioners herein were not the legal heirs of the Leggette D. Kelleam and entitled to their distributive shares in his estate, nor is it contended that the estate was in fact ancestral. The petitioners, E. A. Kelleam and Nell Southard, admit that they obtained the entire estate, both their own share and the shares of the cross-petitioners herein. The attitude assumed by these two petitioners now is that having ob-

tained the property in the decree of distribution no court should require them to make restitution. The trial court found a legal way to restore to the cross-petitioners their just shares in the estate. The Circuit Court in affirming that opinion said:

> "The only conclusion which can be reached from an examination of the transcript is that E. A. Kelleam was a faithless trustee, that he designedly and intentionally proceeded from the beginning to conceal the status of the estate from the court and the heirs; and that he and his sister conspired together to defraud the remaining heirs of that which was their just due. The conclusion of the trial court is the only one that could be reached."

Substantial justice was done in this case and the request for certiorari should be denied.

Respectfully submitted,

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